COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own Motion pursuant to G.L. c. 159, §§ 12 and 16, into the collocation security policies of Verizon New England Inc. d/b/a Verizon Massachusetts	D.T.E. 02-8

MOTION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC. FOR PROTECTIVE TREATMENT OF CONFIDENTIAL INFORMATION

AT&T Communications of New England, Inc. ("AT&T") hereby requests that the Department of Telecommunications and Energy (the "Department") grant protection from public disclosure of certain confidential, competitively sensitive and proprietary information submitted in this proceeding in accordance with G.L. c. 25, § 5D. Specifically, AT&T requests that Attachment No. 1 to AT&T's Panel Rebuttal Testimony dated May 15, 2002, be granted protective treatment because it contains competitively sensitive and highly proprietary information.

Attachment No. 1 has already been provided to the Department, and AT&T is willing to provide it to Verizon and other parties that execute a protective agreement with AT&T in this docket. If Attachment No. 1 is placed on the public record, however, AT&T's competitors would be able to use it to gain an unfair competitive advantage.

I. LEGAL STANDARD.

Confidential information may be protected from public disclosure in accordance with G.L. c. 25, § 5D, which states in part that:

> The [D]epartment may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be on the proponent of such protection to prove the need for such protection. Where the need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

The Department has recognized that competitively sensitive information is entitled to protective status. *See, e.g., Hearing Officer's Ruling On the Motion of CMRS Providers for Protective Treatment and Requests for Non-Disclosure Agreement*, D.P.U. 95-59B, at 7-8 (1997) (the Department recognized that competitively sensitive and proprietary information should be protected and that such protection is desirable as a matter of public policy in a competitive market). In determining whether certain information qualifies as a "trade secret,"[1] Massachusetts courts have considered the following:

> (1) the extent to which the information is known outside of the business;
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> (2) the extent to which it is known by employees and others involved in the business;

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[1] Under Massachusetts law, a trade secret is "anything tangible or electronically kept or stored which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information design, process, procedure, formula, invention or improvement." Mass. General Laws c. 266, § 30(4); *see also* Mass. General Laws c. 4, § 7. The Massachusetts Supreme Judicial Court, quoting from the Restatement of Torts, § 757, has further stated that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors.... It may be a formula treating or preserving material, a pattern for a machine or other device, or a list of customers." *J.T. Healy and Son, Inc.* v. *James Murphy and Son, Inc*., 260 N.E.2d 723, 729 (1970). Massachusetts courts have frequently indicated that "a trade secret need not be a patentable invention." *Jet Spray Cooler, Inc.* v. *Crampton*, 385 N.E.2d 1349, 1355 (1979).

> (3) the extent of measures taken by the employer to guard the secrecy of the information;
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> (4) the value of the information to the employer and its competitors;
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> (5) the amount of effort or money expended by the employer in developing the information; and
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> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. *Crampton*, 282 N.E.2d 921, 925 (1972).

The protection afforded to trade secrets is widely recognized under both federal and state law. In *Board of Trade of Chicago* v. *Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905), the U.S. Supreme Court stated that the board has "the right to keep the work which it had done, or paid for doing, to itself." Similarly, courts in other jurisdictions have found that "[a] trade secret which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless ... to its owner if disclosure of the information to the public and to one's competitors were compelled." *Mountain States Telephone and Telegraph Company* v. *Department of Public Service Regulation*, 634 P.2d 181, 184 (1981).

II. ARGUMENT.

The non-public version of AT&T's Panel Rebuttal Testimony contains competitively sensitive and proprietary information and trade secrets. Specifically, Attachment No. 1 to the testimony – the only information for which AT&T seeks protective treatment – is a diagram depicting a method of interconnection at an AT&T collocation site that has been developed by the company. This method of interconnection was developed by AT&T at AT&T's expense for

its own internal purposes. This information is not publicly available and is not shared with non-AT&T employees for their personal use and is not considered public information.

Indeed, the bottom of the diagram as it exists in AT&T's files contains an internal "AT&T Proprietary" label. This internal proprietary designation indicates that company employees may not disseminate the information within this diagram to non-AT&T employees, such as contract consultants, without the execution of a non-disclosure agreement with the outside party. Even AT&T employees who review these materials are subject to non-disclosure restrictions and are allowed to use them for internal business reasons only. AT&T employees failing to comply with these internal policies are subject to a range of disciplinary action, including suspension or dismissal, under the company's Code of Conduct. Thus, this information is subject to elaborate internal protections and is certainly deserving of confidential treatment by the Department.

Furthermore, the information depicted in Attachment No. 1 is of considerable commercial value to AT&T. Disclosing this information on the public record would place AT&T at a considerable competitive disadvantage. Over the past several years, AT&T has invested a significant amount of time, capital and effort in developing the mode of interconnection displayed in this diagram. Should this information be disclosed publicly, AT&T's local exchange competitors would be allowed to reap the rewards of the method AT&T has developed, profiting on the considerable resources AT&T has devoted to this problem.[2]

[2] Granting protective treatment to this sensitive information is fully consistent with the practice of other parties before the Department. *See* Verizon's Reply to Motions to Compel at 3 n. 3 (noting that it is Verizon's practice to file central office floor plans on a proprietary basis.)

Moreover, public disclosure would be unfair to AT&T from a marketing standpoint. Among other things, the diagram depicts the presence of certain equipment contained within AT&T collocation sites. This equipment is capable of providing certain types of services. Allowing competitors unfettered access to such material would provide them with a window to AT&T's marketing plans – particularly regarding certain services AT&T plans on providing to its local exchange customers. The release of this information would allow competitors to target certain services and avoid others in an attempt to gain a competitive edge on AT&T. The Department has recently recognized that proprietary treatment is necessary to avoid such targeting and prevent competitors from gaining an unfair competitive advantage. *See* Interlocutory Order On Verizon Massachusetts' Appeal Of Hearing Officer Ruling Denying Motion For Protective Treatment, D.T.E 01-31 (August 29, 2001) ("Interlocutory Order") at 9.

Conclusion.

For these reasons detailed above, AT&T requests in accordance with G.L. c. 25, § 5D that the Department grant protective treatment to the non-public version of AT&T's Panel Rebuttal Testimony. This information is entitled to protective treatment for at least five years. After five years, there will be sufficient change in the market so that the proprietary information contained in Attachment No. 1 will no longer be relevant.

Respectfully submitted,

AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

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